

The Seafood Coalition

*National Fisheries Institute (USA)
Fishermen's Marketing Association
Fisheries Survival Fund
Trawler Survival Fund
West Coast Seafood Processors Association
The Groundfish Group—Associated
Fisheries of Maine.
Southeastern Fisheries Association
Coalition of Coastal Fisheries
California Fish and Seafood Institute
Oregon Trawl Commission
Fishermen's Association of Moss
Landing
Long Island Commercial Fishing
Association
Monroe County Commercial
Fishermen's Association
At-Sea Processors Association
Pacific Seafood Processors Association
United Catcher Boats
The Groundfish Forum
North Pacific Longline Association
Southern Offshore Fishermen's
Association
Coos Bay Trawlers Association
Montauk Inlet Seafood, Inc.
Texas Shrimp Association
Monkfish Defense Fund
Western Fishboat Owners Association
Alaska Draggers Association
Western Gulf of Alaska Fishermen's
Association
Alaska Groundfish Databank
Federation of Independent Seafood
Harvesters
Garden State Seafood Association
Blue Water Fishermen's Association
Organized Fishermen of Florida
North Carolina Fisheries Association
New England Seafood Producers
Association
Portland Fish Exchange
City of Morro Bay (CA) Harbor
Department*

September 5, 2003

Ms. Kaja Brix, Chief
Marine Mammal Conservation Division
Office of Protected Resources
NMFS
1315 East-West Highway
Silver Spring, MD 20910
via facsimile (301.713.0376) and first class mail

**RE: Marine Mammal Protection Act of 1972;
Advance Notice of Proposed Rulemaking for the
Zero Mortality Rate Goal, 68 FR 40888.**

Dear Ms. Brix:

Please accept these comments on the ANPR for the Zero Mortality Rate Goal (ZMRG) on behalf of the National Seafood Coalition (*See* 68 FR 40888). The Seafood Coalition is comprised of a diverse group of 35 regional commercial fishing organizations from around the nation. The Seafood Coalition's broad-based membership includes companies involved in all aspects of the fish and seafood industry, including commercial fishing, gear supply & dock operations, processing, importing/exporting, and restaurant/retail market operations.

Members of the Seafood Coalition firmly support ongoing efforts to minimize unintended accidental interactions with marine mammals. Coalition members do not condone unnecessary incidental injury or mortality of marine mammals. Many members of the Coalition are veterans of the MMPA Take Reduction Team process, ESA-Steller sea lion negotiations, and various cooperative research initiatives geared toward understanding and mitigating marine mammal and protected species interactions to the maximum extent feasible. Accordingly, we offer the following substantive comments on the ANPR for the ZMRG.

The proposed application of the ZMRG is inconsistent with the original intent of the statute and must be linked to available technology

The ZMRG was developed in 1972 to specifically address the mammal interaction occurring in the Eastern Tropical Pacific yellowfin tuna purse seine fishery. The standard operating procedure by participants in that fishery was to exploit the natural relationship between tuna and dolphins by directly encircling schools of dolphins. The dolphin mortality associated with this practice precipitated a need for the ZMRG (*See* 68 FR 40889).

However, we must note for the record that Congress never intended to use the ZMRG to “shut down or significantly curtail the activities of the fleet” if the tuna fishermen were using the best available technology to minimize the hazards to dolphins. (*See* 68 FR at 40889). Clearly, the provision was intended to address a specific activity in a specific fishery, the plausibility of which was linked directly to the availability of gear research and technology.

In 1981, Congress went so far as to indicate that the ZMRG requirement was satisfied in the yellowfin tuna fishery based on the continued application of mammal safety technology (*See* H.R. Rep. No. 97-228 at 17; and 68 FR 40889). Similarly, Congress chose not to extend the ZMRG for other fisheries because the necessary technology was not available. The ZMRG remained in MMPA section 101(a)(2) merely “to stimulate new technology for reducing the incidental taking of marine mammals” (*See* H.R. Rep. No. 97-228 at 17-18; and 68 FR 40889).

Congress first expanded the ZMRG for commercial fisheries other than the yellowfin tuna fishery in 1988 (*See* “MMPA Amendments of 1988”, P.L. 100-711). While Congress chose, perhaps unwittingly, to expand the statute as an objective for other fisheries it did not modify the intent or provide additional insight into the meaning of the ZMRG or comment on the availability of technology deemed so critical to achieving the objective in 1981 (*See* 68 FR 40890).

Furthermore, the Marine Mammal Commission’s report titled “Recommended Guidelines to Govern the Incidental Taking of Marine Mammals in the Course of Commercial Fishing Operations After October 1993” provided no additional insight into the interpretation of “insignificant levels approaching zero” or the status of currently available gear technology (*See* 68 FR 40889).

It was not until the 1994 MMPA reauthorization (P.L. 103-238) that Congress adopted a specific date (i.e. April 30, 2001) by which commercial fisheries would be required to reduce mammal interactions to “insignificant levels approaching zero mortality and serious injury”. Here again, Congress provided no insight as to the interpretation of the ZMRG in the 1994 or 1997 MMPA amendments nor did Congress recognize the glaring lack of technology available to achieve the objective vis a vis the date-specific endpoint.

Subsequently, NMFS’ Dr. Andrew Rosenberg (at the time, Deputy Assistant Administrator for Fisheries) delivered Congressional testimony summarizing the current situation with respect to the ZMRG and the paucity of gear research and technology. The following is an excerpt from Dr. Rosenberg’s April 6, 2000 testimony before the House Subcommittee on Fisheries Conservation, Wildlife and Oceans

We have also concluded that reaching ZMRG will require extensive research, gear technology development, and testing to identify ways to further reduce takes. Therefore, given that it has been difficult to meet PBR levels for most plans, and given that is unlikely that fisheries will be able to meet either ZMRG deadline, we would welcome any suggestions that the Subcommittee may have to assist us in addressing this issue.

Clearly, the agency has openly recognized the nexus between the absence of critical gear research and technology and the ability to achieve the ZMRG. Sadly, little has been accomplished to date to reverse this situation as Take Reduction Teams continue to struggle with limited information on stock status, gear technology, and innovation. Implementing a restrictive ZMRG definition in the absence of available technology will prevent the process from moving forward in a constructive common sense manner.

A restrictive definition of the ZMRG is biologically unnecessary

The ZMRG is biologically unnecessary for mammal stocks to achieve the main objectives of the MMPA. The main objectives of the MMPA are “to protect and encourage marine mammals to develop to the greatest extent feasible commensurate with sound policies of resource management” such that they do not “cease to be a significant functioning element of the ecosystem of which they are a part” and “they do not diminish below their optimum sustainable population (OSP)” U.S.C. 1361(2);(6).

The Potential Biological Removal (PBR) is calculated to ensure that mammal stocks achieve/maintain OSP with 95 percent probability. The PBR is defined as “the maximum number of animals not including natural mortalities that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population.” (See 16 U.S.C. Sec. 1362(20)). The statute contains no specified time requirement for when a stock must achieve OSP. Thus, from a rigorous scientific standpoint PBR is sufficient - there is no need for the addition of a restrictive ZMRG definition to ensure that mammal stocks achieve/maintain OSP.

Currently, many members of the Seafood Coalition firmly believe the three components of the PBR calculation (i.e. minimum population estimate, one half of maximum default net productivity rate, and a fractional default recovery factor) are sufficiently conservative, even before consideration of the ZMRG.

We provide an example in this submission using actions relating to harbor porpoise to elucidate excessive precautionary decision-making already employed in the MMPA. Harbor porpoise is a small, coastal, migratory cetacean found along the east coast from Canada to North Carolina that is currently managed under the 1999 Mid-Atlantic Harbor Porpoise Take Reduction Plan. There is also a separate but closely related New England harbor porpoise management plan.

In this particular case (see Table 1 below) the population estimates available to the Harbor Porpoise TRT in 1997 (NMFS data: Palka, D. Abundance of Gulf of Maine/Bay of Fundy Harbor Porpoise based on shipboard and aerial surveys during 1999. May 2000). The HPTRT had only three years of survey data (i.e. 1991, 1992, 1995) available to calculate PBR in 1997. In this particular case, NMFS chose not to utilize only the most recent 1995 survey of 74,000, or the arithmetic average of the three surveys, nor did the Agency drop the oldest and most dubious 1991 survey. Instead, NMFS reduced the porpoise population estimate to 54,300 by using the inverse variance-weighted average of the three surveys. This decision reduced the number of harbor porpoise by 26-percent.

NMFS further reduced the population estimate 8.7-percent by taking the 20th percentile of the log-normal distribution to arrive at $N_{min} = 48,289$. The N_{min} estimation is intended to provide reasonable assurance the actual population size is equal to or greater than the estimate. Thus, the best available population numbers are adjusted downward to account for uncertainty, further reducing the value of PBR. This winnowing process reduced the actual current population estimate by 34.7-percent (from 74,000 to 48,289 animals). The net reduction in the final PBR calculation was excessive, from 740 to 483 animals.

Table 1

NMFS SURVEY DATE	POPULATION ESTIMATE	POP. ESTIMATE ADJUSTED FOR N_{min}	PBR
1991	37,500		
1992	67,500		
1995	74,000		740
Mean of above 3 estimates	59,667		
Inverse variance of weighted average of above 3 estimates	54,300	48,289	483

In addition to a conservative estimate of N_{\min} outlined above, the PBR calculation allows for consideration of only half the species' net productivity rate (i.e. $1/2 R_{\max}$). This effectively adds a second level of precaution to the PBR calculation. In fact, the most common default R_{\max} value (i.e. 0.04) applied to both large and small cetaceans is the value most applicable to large whales. The agency utilizes only half of the large whale default value (i.e. $R_{\max} = 1/2 \times 0.04$) despite evidence elucidating higher productivity rates for certain small cetaceans (i.e. >0.065 , in the case of harbor porpoise). Thus, R_{\max} default values are intended to be initially low and subsequently halved to again account for possible uncertainty.

The third precautionary straw is delivered via the PBR calculation in the form of a "safety" or recovery factor (i.e. F_r). The main purpose of this component is to compensate for uncertainty resulting from unknown estimation error. The net effect for most stocks is a 50-percent reduction in the value of PBR. Thus, a multi-tiered precautionary approach is incorporated into each and every PBR calculation to account for uncertainty and ensure that mammal populations achieve OSP levels at least 95-percent of the time.

In addition to the conservatism built into the PBR calculation elucidated above, it is our perception that NMFS will at times apply inconsistent and inappropriate methods of estimating serious injury and incidental mortality of mammals for fisheries around the Nation. The application of serious injury guidelines and metrics of extrapolation for interaction levels must be consistent and equitable. In some instances NMFS utilizes questionable "pooling" methods to extrapolate estimates of total annual marine mammal interactions. In other instances mammal mortality is extrapolated through an entire fishery based on the ratio of the "number of mammal interactions to the pounds of fish caught" on per set/trip basis. These methods are not suitable for estimating rare, random events and often times lead to overestimation of the problem. The situation is exacerbated in some fisheries by assessing serious injury penalties implied from observer comments through the application of a percentage of extrapolated mortality estimates which are averaged across years to derive mean annual mortality. In each instance, these practices result in gross distortions of the levels of mammal interactions with certain fisheries and infuse additional layers of conservatism into the management process.

Comments on proposed ANPR options and alternative

Members of the Seafood Coalition are of the opinion that applying an overly restrictive ZMRG definition in addition to the existing precautionary PBR process far exceeds the scientific objectives of the MMPA and the needs of marine mammal stocks to reasonably achieve OSP. Furthermore, as we have already experienced with the ZMRG during the past year, an improper ZMRG definition will provide animal rights advocates with yet another litigious weapon that can be used to undermine the integrity of the management system and undermine the contributions of sustainable fisheries to the U.S. economy. Accordingly, we offer the following specific comments on the ZMRG Options included in the ANPR.

OPTION I

The Seafood Coalition is opposed to Option I because it: (1) is based on overly precautionary N_{\min} and PBR calculations; (2) is not contingent on available practical technology and economic feasibility; (3) is based on a conservative MMC definition of "negligible impact" that is no more defensible than other percentages of PBR (i.e. why not 11%, 13.75%, 15% or 20.02% of PBR?); (4) may lead to overly precautionary restrictions for mammal stocks with low PBRs; and (5) seeks to maintain stocks at an unreasonably high level (i.e. 95%-98%) of the estimated range (i.e. 60%-100%) of carrying capacity.

OPTION II

The Seafood Coalition is opposed to Option II because it: (1) is based on a 10-percent delay in recovery time that is wholly irrelevant to the requirements of the statute; (2) is not contingent on available practical technology and economic feasibility; (3) is based on a point-specific 0.2-percent of an overly

precautionary N_{\min} calculation; (4) requires populations be maintained at a conservative 90-percent of current carrying capacity which is overly restrictive and about which NMFS suffers a paucity of information; and (5) may lead to increased restrictions by not permitting consideration of other parameters or circumstances.

OPTION III

The Seafood Coalition is opposed to Option III because it: (1) is based on a 5-percent delay in recovery time that is wholly irrelevant to the requirements of the statute; (2) is not contingent on available practical technology and economic feasibility; (3) is based on point-specific default values of 0.1-percent (cetacean) 0.3-percent (pinniped) for overly precautionary N_{\min} calculations; (4) requires populations be maintained at a conservative 95-percent of current carrying capacity about which NMFS suffers a paucity of information; and (5) may lead to increased restrictions to protect stocks that are at or above OSP.

PROPOSED ALTERNATIVE ZMRG DEFINITION

The Seafood Coalition remains firmly opposed to a restrictive definition of the ZMRG for managing stocks of marine mammals. As such, we propose the following components be considered in developing the final ZMRG definition:

- (1) ZMRG = PBR, where the use of N_{\min} , $\frac{1}{2} R_{\max}$, and F_r (each component contributing to an already precautionary PBR calculation) provide sufficient probability that a given marine mammal stock will achieve/maintain OSP;
- (2) ZMRG should not be applicable to robust stocks, stocks that are severely endangered (i.e. PBR = <5.0 individuals), or stocks not under an MMPA management program;
- (3) The application of ZMRG should be prioritized by the Secretary for stocks that have small known population size, those that are declining most rapidly, and those stocks whose level of incidental mortality and serious injury has not dropped significantly within 5 years of Take Reduction Plan implementation;
- (4) The ZMRG definition must incorporate available technology and economic feasibility into an initial assessment of whether or not fisheries have achieved the ZMRG by the statutory due date such that if technology would not allow further reductions in an economically feasible manner, the fishery would be found in compliance with the statute. Similarly, if technology is available and is not being applied in a fishery determined to be above the ZMRG, then the fishery would be required to incorporate the newly developed technology, if economically feasible to do so;
- (5) The Secretary, working cooperatively with the appropriate Take Reduction Team and Scientific Review Group, should conduct the review and determination regarding the availability of technology and economic feasibility;
- (6) If technology is deemed not available and a fishery is determined to be above the ZMRG after 5 years under an approved plan, then the Secretary should work with fishery participants to develop and implement the appropriate technology.

Summary of Seafood Coalition Recommendations

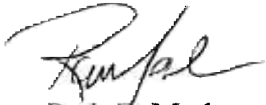
- The National Seafood Coalition is strongly opposed to the use of a restrictive ZMRG to manage marine mammal stocks. We believe the requirement is overly precautionary, not biologically justified for mammal stocks to achieve OSP, affords excessive status to mammals regardless of stock condition, results in unbalanced ecosystems, is not based on sound wildlife management principles, and is currently cited by certain NMFS staff, representatives of the Marine Mammal Commission, environmentalists, and animal rights advocates during Take Reduction Team negotiations as justification for additional restrictions on commercial fishing effort; The ZMRG is unnecessary for marine mammal stocks to achieve OSP and should therefore be carefully defined by the agency as a stimulant for technology rather than a conservative, rigidly defined, date-specific objective;
- The ZMRG definition must be contingent on the best available practical technology and fishing practices consistent with the original intent of the statute:

The ZMRG definition must also be clarified to take into consideration the standing fishery management plan requirements and current economic conditions in a given fishery;

- Consistent with the original intent and policy of Congress in 1972, the ZMRG must not be defined in such a manner that it can be used to shut down or significantly curtail the activities of commercial fishing;
- See alternative ZMRG definition elucidated above whereby ZMRG = PBR.

The thirty-five members of the Seafood Coalition appreciate the opportunity to comment on the ANPR for the ZMRG.

Respectfully submitted on behalf of the members of the Seafood Coalition,



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